

This is a claim for an August 14, 2005, accident and for alleged injuries to both feet. In the October 2008 Award, Judge Roberts found claimant sustained a 7.5 percent impairment to the left foot and a five percent impairment to the right great toe. The Judge denied claimant's request for payment of Dr. P. Brent Koprivica's medical charges as

unauthorized medical expense because “the purpose of Dr. Koprivica’s evaluation was to obtain an impairment rating and is in direct contradiction with **K.S.A. 44-510h**.”<sup>1</sup>

Claimant contends the Judge erred in determining the amount of functional impairment claimant has sustained to her lower extremities. Claimant argues that the podiatrist’s conclusion that claimant sustained no impairment to her feet was flawed as it was based solely upon the fact that claimant did not return for a follow-up appointment. In addition, claimant maintains the podiatrist’s opinion regarding impairment should be given little weight as the first time the doctor saw the AMA *Guides*<sup>2</sup> was immediately before the doctor’s deposition.

On the other hand, claimant asserts Dr. Koprivica’s testimony regarding claimant’s impairment should be given the most weight “as it was substantially more supported by the greater weight of the evidence than the testimony of DPM Hagen.”<sup>3</sup> Finally, claimant contends the Judge erred by denying her request for the payment of \$500 of Dr. Koprivica’s charges as unauthorized medical treatment. Claimant argues those charges were for examination, diagnosis, and treatment and, therefore, they should be paid under K.S.A. 44-510h.

In summary, claimant requests the Board to find (1) she has sustained more than a 7.5 percent impairment to the left foot, (2) she has sustained a 13 percent impairment to the right foot, and (3) she should be awarded \$500 for unauthorized medical services provided by Dr. Koprivica.

Conversely, respondent argues there is no support for any award of permanent partial disability compensation as Dr. Koprivica’s evaluation was premature and before claimant underwent surgery in late September 2006 on her right great toe. Respondent also argues that Dr. Koprivica’s ratings were flawed as the doctor used a portion of the *Guides* that dealt with ankylosis, which the doctor agreed was not present. Finally, respondent argues the Judge appropriately denied claimant’s request for unauthorized medical benefits. Respondent cites the *Deguillen*<sup>4</sup> case, which held, “[i]n order for an unauthorized medical examination to be eligible for reimbursement under K.S.A. 2006

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<sup>1</sup> ALJ Award (Oct. 8, 2008) at 4.

<sup>2</sup> American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>3</sup> Claimant’s Brief at 3 (filed Nov. 19, 2008).

<sup>4</sup> *Deguillen v. Schwan’s Food Manufacturing, Inc.*, 38 Kan. App. 2d 747, 172 P.3d 71 (2007), rev. denied \_\_\_ Kan. \_\_\_ (2008).

Supp. 44-510h(b)(2), no impairment rating may be solicited from that physician either as a part of the initial engagement or thereafter.”<sup>5</sup>

The only issues before the Board on this appeal are:

1. What is the nature and extent of claimant’s injury and disability?
2. Is claimant entitled to receive reimbursement of \$500 as unauthorized medical expense for the examination and evaluation that Dr. Koprivica performed in September 2006?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties’ arguments, the Board finds and concludes:

Claimant worked for respondent on a part-time basis tending to the salad bar at one of its retail grocery stores. On August 14, 2005, a power jack being operated by a semi-truck driver unexpectedly burst through the swinging doors to a storage area and either struck or ran over claimant’s right foot. One of the doors swung open and struck the top of claimant’s left foot. When a co-worker removed claimant’s right shoe, claimant’s sock was bloody.

Claimant was promptly taken to a hospital emergency room. The medical personnel made a small hole in the nail of claimant’s right great toe, which relieved the pressure from the blood that had accumulated under the nail, gave her pain medication, and advised her to follow up with her doctor.

The next day claimant began treating with respondent’s workers compensation doctor, who pulled off the nail, told claimant to stay off her feet as much as possible, and referred claimant to a podiatrist, Dr. Heidi C. Hagen. According to claimant, Dr. Hagen was surprised nobody had closed a laceration under the right great toenail.

As the toenail grew back, it began growing into the skin. Consequently, in October 2005 Dr. Hagen again removed the nail and killed the nerve root so the nail would not return. The last surgery claimant had on her right great toe was on September 29, 2006, when Dr. Hagen removed a bony growth or bone spur from the end of the toe.

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<sup>5</sup> *Id.* at 756.

Dr. Hagen also treated claimant's left foot. The doctor x-rayed the foot and tried toe separators. The doctor also provided claimant with an insert for her left shoe.

At her June 2008 regular hearing, claimant described her present symptoms. The right great toe is very sensitive to pressure and is made painful by anything that touches or rubs against the nailbed. Claimant testified the only thing that had helped her left foot soreness was the insert that Dr. Hagen had provided. And without that insert claimant believes she would be unable to stand for more than a couple of hours.

### **The nature and extent of claimant's injury and disability**

Claimant presented the testimony of her medical expert, Dr. P. Brent Koprivica, who is board-certified in both emergency medicine and occupational medicine. The doctor examined claimant on September 8, 2006, which was several weeks before the final surgical procedure performed by Dr. Hagen on claimant's right great toe. Claimant advised Dr. Koprivica that her right great toe was extremely sensitive and that she could not tolerate a closed shoe or even a sheet touching her right great toe. Claimant also told Dr. Koprivica she had pain in both her left midfoot and great toe.

Dr. Koprivica concluded claimant had a sensitive nailbed of the right great toe. The doctor also thought claimant had a chronic sprain in the metatarsal-tarsal joint area of the left foot, which led claimant to walk abnormally and also caused her to develop extensor hallucis longus tendinitis (which is tendinitis of the muscle that raises the big toe).

Accepting as true claimant's testimony that her September 29, 2006, surgery did not improve her symptoms, Dr. Koprivica rated claimant as having a 13 percent impairment to the right foot and a 15 percent impairment to the left foot. The doctor indicated the *AMA Guides* did not address claimant's condition or situation and, therefore, the doctor used the *Guides'* Table 61 as a reference in rating claimant's impairment.

As indicated above, Dr. Koprivica saw claimant only one time and, therefore, he did not examine her right foot following her September 29, 2006, toe surgery. Furthermore, the doctor explained the difficulty in rating a toe under the *Guides* as the *Guides* rates an impairment to a toe as an impairment to the foot. The doctor testified, in part:

Q. (Mr. Kolich) What would the rating be on just the toe? Do you know?

. . . .

A. (Dr. Koprivica) I don't know the mathematics to convert it if you had -- if you did it at the toe level. The guides do it according to the foot, and that's the percentage number. And I guess in theory, if you do a scheduled impairment of the foot,

multiply it, the percent times the number of weeks, and then converted it to a toe number of weeks and calculated those percentages, you could do it. I just don't know those weeks.

. . . .

Q. Okay. So, in essence, the guides don't provide a basis for rating an impairment just to the toe?

A. I don't see -- I don't see that. I'm not sure that they do. Now, again, they -- I think you can do it mathematically. You know, if you tell me how many weeks a toe is at the -- at the IP joint or the MTP joint and then -- you can calculate the number of weeks represented by a foot, take that number, whatever the statute is -- language is, times a percent that would be so many weeks, and divide it by the toe number of weeks, that would give you a percentage number.<sup>6</sup>

Respondent presented the testimony of Dr. Heidi C. Hagen, who is a doctor of podiatric medicine. Dr. Hagen first saw claimant in late August 2005 and last saw her in mid-October 2006.

Dr. Hagen treated claimant's left foot and in October 2005 noted that claimant was complaining of soreness and tenderness in her left foot. But, according to Dr. Hagen, that was the last time claimant made any left foot complaints as she did not make left foot complaints upon returning to Dr. Hagen in September and October 2006 for additional treatment of the right great toe.

Dr. Hagen also testified that claimant did not return for a follow-up visit for the right great toe after October 10, 2006. Therefore, the doctor *presumed* claimant was no longer having problems with that toe. When the doctor last saw claimant in October 2006, Dr. Hagen expected claimant's toe to heal uneventfully and allow her to wear a normal shoe without pain.

As Dr. Hagen has not seen claimant since October 2006, the doctor *assumes* claimant no longer experiences any pain in either foot. Consequently, Dr. Hagen concluded claimant has not sustained any impairment as a result of her August 2005 accident. The doctor testified, in part:

As well as I can assess it, she has no injury as she's not complained about it and I have not seen her since so I have to say she's not having any pain.<sup>7</sup>

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<sup>6</sup> Koprivica Depo. at 22-24.

<sup>7</sup> Hagen Depo. at 10.

But Dr. Hagen also testified claimant did not have (or the doctor did not note) any leg length discrepancy, gait derangement, muscle atrophy, muscle weakness, lost range of motion in her right great toe or left foot, joint ankylosis, arthritis in either foot, amputation of either foot, any problem with her hindfoot, any problem with her midfoot, skin loss, peripheral nerve injury, causalgia, reflex sympathetic dystrophy, or any vascular disorder. And that the *Guides*' provisions dealing with forefoot deformity likewise did not apply.

Nonetheless, Dr. Hagen acknowledged that claimant complained of pain with pressure on her right great toe before the September 2006 surgery. The doctor also acknowledged that she provided claimant with inserts for both feet for arch pain.

Dr. Hagen did not use the *AMA Guides* when she initially determined claimant sustained no functional impairment due to her injuries. Indeed, the doctor acknowledged the first time that she had ever seen the *Guides* was about 10 minutes before her deposition began and that she had never used the *Guides* to rate an impairment.

The Board is not persuaded that either doctor's opinion on claimant's functional impairment is entitled to any greater weight than the other. Dr. Hagen presumed claimant's symptoms would resolve. But they have not. On the other hand, Dr. Koprivica did not examine claimant after her September 2006 surgery and, therefore, did not examine her after she had reached maximum medical recovery. Consequently, both doctors' opinions have their shortcomings.

The Judge found claimant sustained a 7.5 percent impairment to the left foot. The Judge apparently averaged the zero percent impairment rating provided by Dr. Hagen with Dr. Koprivica's 15 percent rating to the left foot. The Board affirms the Judge's finding regarding the impairment to claimant's left foot.

Claimant's right lower extremity injury appears to be confined to the great toe. The evidence in this claim is that the *Guides* does not rate impairments to the toes. Therefore, using Dr. Koprivica's formula for converting a foot impairment to a toe impairment the Board finds the 13 percent impairment to the foot is the equivalent of a 54.21 percent impairment to the great toe.<sup>8</sup> Averaging the zero percent impairment rating from Dr. Hagen with 54.21 percent yields a 27.11 percent impairment to the great toe. Accordingly, the Board finds the impairment to the right great toe should be increased to that latter amount.

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<sup>8</sup> Under the schedule of K.S.A. 44-510d, a worker is entitled to receive 125 weeks of permanent disability benefits for the loss of a foot and 30 weeks of benefits for the loss of a great toe. 125 weeks divided by 30 weeks equals 4.17. And 4.17 times 13 percent (the rating to the foot provided by Dr. Koprivica) equals 54.21 percent.

**Unauthorized medical benefits**

Dr. Koprivica charged \$550 for the September 8, 2006, examination and report, in which he recommended additional medical treatment for the right great toe and orthotics for the left foot but did not address claimant's functional impairment. The doctor charged an additional \$75 for an addendum in which he provided his opinion of claimant's functional impairment.

The Workers Compensation Act provides that workers may seek unauthorized medical treatment and receive reimbursement up to \$500. The Act provides:

Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.<sup>9</sup>

But in *Deguillen*,<sup>10</sup> the Kansas Court of Appeals held that workers may not seek reimbursement for unauthorized medical benefits whenever an impairment rating is obtained. And that is true although the rating may be procured sometime after the examination or evaluation.

We hold that in order for an unauthorized medical examination to be eligible for reimbursement under K.S.A. 2006 Supp. 44-510h(b)(2), no impairment rating based upon that examination may be made a part of the record, upon penalty that the examination expense may not be reimbursed. In order for an unauthorized medical examination to be eligible for reimbursement under K.S.A. 2006 Supp. 44-510h(b)(2), no impairment rating may be solicited from that physician either as a part of the initial engagement or thereafter. Although employees are not prohibited from seeking independent advice on work-related injuries and may seek reimbursement for up to \$500, the clear intent of the legislature is to prohibit such funds being applied to an improper impairment rating.<sup>11</sup>

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<sup>9</sup> K.S.A. 2007 Supp. 44-510h(b)(2).

<sup>10</sup> *Deguillen v. Schwan's Food Manufacturing, Inc.*, 38 Kan. App. 2d 747, 172 P.3d 71 (2007), rev. denied \_\_\_ Kan. \_\_\_ (2008).

<sup>11</sup> *Id.* at 756.

*Deguillen* is controlling. Consequently, the Board affirms the Judge's denial of claimant's request that she receive reimbursement as unauthorized medical expense for the services rendered by Dr. Koprivica.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>12</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board affirms the award for the left foot injury but modifies the award for the right great toe injury as follows:

**Left foot**

Jeanne R. Ambrose is granted compensation from Hy-Vee Food Stores, Inc., and its insurance carrier for an August 14, 2005, accident and resulting disability to the left foot. Based upon an average weekly wage of \$276.65, Ms. Ambrose is entitled to receive .43 weeks of temporary total disability benefits at \$184.44 per week, or \$79.31, plus 9.34 weeks of permanent partial disability benefits at \$184.44 per week, or \$1,722.67, for a 7.5 percent permanent partial disability to the left foot, making a total award of \$1,801.98, which is all due and owing less any amounts previously paid.

**Right great toe**

Jeanne R. Ambrose is granted compensation from Hy-Vee Food Stores, Inc., and its insurance carrier for an August 14, 2005, accident and resulting disability to the right great toe. Based upon an average weekly wage of \$276.65, Ms. Ambrose is entitled to receive 8.13 weeks of permanent partial disability benefits at \$184.44 per week, or \$1,499.50, for a 27.11 percent permanent partial disability to the right great toe, making a total award of \$1,499.50, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

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<sup>12</sup> K.S.A. 2007 Supp. 44-555c(k).



Dated this \_\_\_\_ day of January, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Davy H. Bony, Attorney for Claimant  
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier  
Marcia L. Yates Roberts, Administrative Law Judge